



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: MARCH 06, 2023

IN THE MATTER OF:

Appeal Board No. 627137

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determination holding the claimant eligible to receive benefits. The employer requested a hearing and objected contending that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There was an appearance on behalf of the employer. By decision filed December 9, 2022 (), the Administrative Law Judge overruled the employer's objection and sustained the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed as operations manager/engineer by the employer property management company for more than three years. The claimant was a full-time, salaried employee.

On April 21, 2022, the employer issued a written warning to the claimant because he did not work his agreed upon hours on April 15, 2022. Specifically, the claimant was scheduled to work from 12:30 PM to 9:00 PM, but began working

for another employer in the same building at 6:25 PM. The claimant's timecard for April 15, 2022 reflected that he had worked for the employer from 12:00 PM to 11:00 PM. The written warning given to the claimant, and signed by him, stated that the employer viewed the claimant's conduct to be a theft of company time, as the claimant did not work the agreed-upon hours. The written warning also indicated that immediate satisfactory improvement in the claimant's conduct must be shown or further disciplinary action would be taken, including suspension or discharge.

In addition, the claimant's supervisor (the employer's Vice President who gave the written warning to the claimant), told the claimant that if he left before the end of his scheduled shift for any reason without notifying the employer, he would be discharged. The employer needed to be able to plan for any schedule variations to protect the building it was responsible for managing.

On August 8, 2022, the claimant was scheduled to work until 9:00 PM; he left without notice to his supervisor, or anyone in management, at 6:00 PM. The claimant's supervisor learned that claimant did not work his full shift upon reviewing work orders on August 10, when it was apparent that work that was supposed to be completed by the claimant on August 8, had not been done. Upon reviewing surveillance footage, the supervisor observed that the claimant left three hours before the end of his shift. The claimant had not notified the employer or asked for permission to leave early.

The claimant's supervisor notified the building owner of the claimant's conduct; the two of them met with the claimant on August 10, 2022 and discharged him for leaving early without notifying the employer on August 8, 2022.

OPINION: The evidence establishes that the claimant was discharged when the employer learned that he left work three hours before the end of his shift on August 8, 2022 and had not notified the employer, or asked for permission to leave early.

We find that the credible firsthand testimony in the record establishes that the claimant was on notice that his conduct on August 8, 2022 would jeopardize his employment. Even if the April 21, 2022 written warning is not seen as sufficient notice that leaving his job earlier than the scheduled end of his shift could jeopardize his job, the employer's Vice President provided credible, undisputed, firsthand testimony that on April 21, 2022, he told the

claimant that if he left work early for any reason without notice to the employer, he would be discharged.

We note that the claimant has not disputed that he left work early on August 8, 2022 without notifying the employer. In the summary of his statement taken by a Department of Labor representative, the claimant acknowledged that he did not tell anyone that he was leaving before his shift ended that day. The summary also indicates that the claimant did not try to call, text, or e-mail his supervisor or anyone in management. Significantly, the employer's Vice President credibly testified that he is always available by text or phone, and that the claimant had texted him in the past.

We find that the claimant was on notice that leaving before the end of his scheduled shift without notification to the employer would result in his discharge, and that therefore his August 8, 2022 behavior of leaving work early without notifying the employer, constitutes misconduct for unemployment insurance purposes. Accordingly, we conclude that the claimant was separated from his employment under disqualifying circumstances.

DECISION: The decision of the Administrative Law Judge is reversed.

The employer's objection, that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future, is sustained, effective August 8, 2022.

The initial determination, holding the claimant eligible to receive benefits, is overruled.

The claimant is disqualified from receiving benefits, effective August 8, 2022, until the claimant has subsequently worked in employment and earned remuneration at least equal to 10 times the claimant's weekly benefit rate. Employment and earnings from non-covered, excluded or self-employment will not count.

The claimant is denied benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER